

NORTHWESTERN COLORADO BROADCASTING COMPANY

IBLA 74-327

Decided November 20, 1974

Appeal from decision of the Colorado State Office, Bureau of Land Management, rejecting radio tower and transmitter site right-of-way application C-20538.

Set aside and remanded.

1. Rights-of-Way: Act of March 4, 1911 – Rights-of-Way: Applications

The Bureau of Land Management should not deny a radio tower and transmitter site right-of-way application solely because of potential desensitization to existing user receivers in the application area. Under such circumstances, where there are no other objections, the Bureau should inform the applicant that the communications right-of-way will be made available contingent upon a favorable determination by the Federal Communications Commission concerning electromagnetic compatibility.

APPEARANCES: George O. Cory, President, Northwestern Colorado Broadcasting Company.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Northwestern Colorado Broadcasting Company has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated May 10, 1974, rejecting its application for a right-of-way to be used for the construction of a transmitter building and tower for FM radio transmissions. On March 25, 1974, appellant filed an application for a communications right-of-way pursuant to the Act of March 4, 1911, 36 Stat. 1253, as amended, 43 U.S.C. § 961 (1970). In its application, appellant stated that it had simultaneously filed an application with the Federal Communications

Commission (FCC) for a construction permit to build a 100,000 watt stereo FM facility on the right-of-way site. Appellant intends to provide a primary FM signal to a presently "white" (no service) area.

In its decision denying approval of appellant's application, the BLM stated, in part, the following:

The letter of application dated March 20, 1974, indicates the facility is planned to radiate 100,000 watts. This would desensitize FM two-way receivers presently operating at the site, as well as a television translator presently operating there.

Because of the desensitization to existing user receivers in the application area, approval of the application is hereby denied. * * *

In its Statement of Reasons on Appeal, appellant argues that any desensitizing of FM two-way receivers or television translators presently operating at the site can be readily corrected in accordance with standard engineering practices in common use in the industry. Appellant also points out that the selected site offers perhaps the only feasible location for proper coverage considering primary market distribution of farm and ranch homes.

The Department of the Interior is authorized and empowered to grant easements for rights-of-way "upon the public lands and reservations of the United States * * * for radio, television, and other forms of communication * * *." 43 U.S.C. § 961 (1970). However, an application which does not conform with the law or regulations under which filed or the approval of which would be inconsistent with the public or Government interest, will be rejected. 43 CFR 2802.2-1(b). Tucson Radio Inc., 8 IBLA 441, 442 (1972).

The BLM determined that it would not be in the public interest to grant appellant a communications right-of-way given the foreseeable desensitization to existing user receivers in the application area. Accordingly, appellant's application was rejected. We hold that the BLM's rejection of appellant's right-of-way application was improper.

By the Communications Act of 1934, 48 Stat. 1081, as amended, 47 U.S.C. §§ 301 et seq. (1970), Congress made the Federal Communications Commission its instrument for applying legislative standards to and expert supervision over communication matters. Pursuant to 47 U.S.C. § 303(f), the FCC is empowered to promulgate such regulations as it deems necessary to prevent interference between radio stations. 47 CFR 73.24(b) and 47 CFR 73.37 set standards for permissible levels

of signal interference. Specific procedures concerning applications for new or modified transmitting facilities to be located on land under the jurisdiction of the BLM are set out in 47 CFR 1.70. See Western Arizona CATV, 15 IBLA 259, 261 (1974).

Prior decisions by the Department of the Interior indicate that electromagnetic compatibility issues arising in communications right-of-way applications are to be referred to the FCC. Tucson Radio Inc., *supra*; Charles Vanda, Nevada 06231 (August 30, 1965). In such cases the FCC has either denied license applications, conditioned their approval by requiring the licensee to correct any desensitizing caused to other systems, or, in appropriate instances where the public interest was served, granted radio station licenses despite resulting interference to existing stations. Tucson Radio Inc. v. FCC, 452 F.2d 1380 (D.C. Cir. 1971); see also Democrat Printing Co. v. FCC, 202 F.2d 298, 303 (D.C. Cir. 1952). This BLM referral procedure is also consistent with recently promulgated BLM Manual Instructions which provide procedures to be followed in granting and administering new or modified communications structures and facilities on land under the Bureau's jurisdiction. BLM Manual § 2861, RADIO AND TELEVISION SITES (July 3, 1974). The instructions were developed to assure proper coordination of BLM Procedures with the procedures of the FCC and the Interdepartmental Radio Advisory Committee (IRAC). 1/ Section 2861.21(6b) of the Instructions reads as follows:

If the site is unavailable for reasons other than electromagnetic incompatibility, [the State Office] notifies FCC or IRAC and issues decision rejecting application. (Emphasis added.)

If there are existing users in the application area and the only issue is electromagnetic compatibility, section 2861.22 instructs the State Office to issue a notice of site availability to the applicant, simultaneously sending copies of a notice of the proposed electronic facility, with parameters attached, to existing users. 2/ An additional

1/ The FCC grants station assignments to nongovernmental users; IRAC grants station assignments to Government users.

2/ In accordance with section 2861.22 of the BLM Manual and 47 CFR 1.70(b), notice of appellant's communications right-of-way application, denial and appeal was given to other users in the area of the proposed site and each was invited to make comments to this Board. See also Western Arizona CATV, 15 IBLA 259, 261 (1974). The present users are: Yampa Valley Electric (C-0123947), Moffat County (C-014356), Texaco, Inc. (C-020981), Western Slope Gas Co. (C-279), Colorado State Patrol (C-034526), and Henderson Construction Co. (C-904). By letter dated August 12, 1974, Western Slope Gas Co. informed the Board that it believed an additional

notice regarding the proposed facility is to be sent to the FCC or IRAC, with technical data attached, with a list of all users to whom were sent copies of the notice of the proposed facility. Section 2861.22(3) then instructs the following:

Upon receipt of authorization from FCC or IRAC, [arrange] for appraisal to determine proper rental.

* * *

3a. If authorization is denied, application is rejected. (Emphasis added.)

[1] Thus, past Departmental decisions, the BLM Instruction Manual, and FCC regulatory procedures conjoin to establish a clear framework for coordinating the processing of communications right-of-way applications which raise only issues of signal interference and desensitizing to existing communication systems. Accordingly, where there are no other objections, we hold that the BLM should have informed appellant that the communications site right-of-way would be made available pending a favorable determination by the FCC concerning electromagnetic compatibility. Tucson Radio Inc., supra; Charles Vanda, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for action consistent with the views expressed herein.

Martin Ritvo
Administrative Judge

(fn. 2 cont'd)

high power communication facility in the application area would cause desensitization to some receivers in the area.

By letter dated June 27, 1974, the Division of Communications for the State of Colorado informed the Board that it supported the BLM's denial of appellant's application as it believed the entry of appellant's facility would interfere with the Colorado State Patrol and Moffat County communication operations. The State noted that "[a]s per FCC Rules and Regulations, if this permit is granted, this division will require the Northwestern Colorado Broadcasting Company to pay the necessary equipment and labor to correct any interference or desensing caused to the state's systems."

We concur.

Anne Poindexter Lewis
Administrative Judge

Joan B. Thompson
Administrative Judge

